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La Barre, George B.

History of the observance of Sunday

Trenton, N.J.

[1923]

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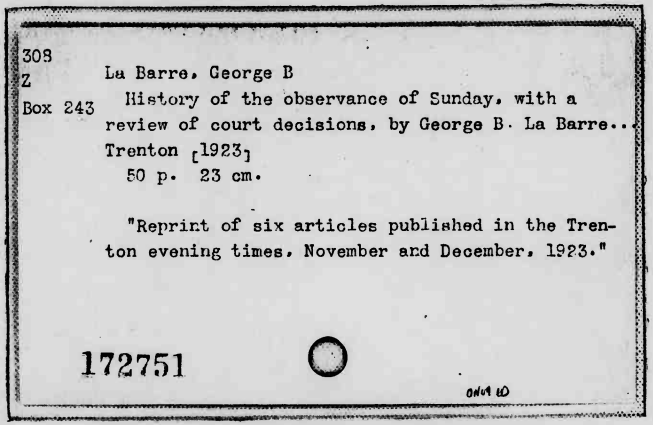

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La Barre, George B
History of the observance of Sunday, with a review of court decisions, by George B. La Barre..
Trenton [1923]
50 p. 23 cm.

"Reprint of six articles published in the Trenton evening times, November and December, 1923."

172751

TECHNICAL MICROFORM DATA

FILM SIZE: 35mm REDUCTION RATIO: 10:1 IMAGE PLACEMENT: IA (IIA) IB IIB

DATE FILMED: 5-8-97 INITIALS: JB

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HISTORY OF THE OBSERVANCE OF SUNDAY

With a Review of Court Decisions, Etc.

By GEORGE B. LA BARRE

Director of Public Safety, Trenton, New Jersey

One of the issues in the political campaign just closed makes it pertinent to review, somewhat briefly on account of space, the history of the observance of Sunday as the Christian Sabbath, the application of statutory laws, court decisions and constitutional principles relating thereto; the advent of religious toleration and the acknowledgment of the right of freedom of conscience; the reason for the adoption of the First Amendment to the Constitution of the United States, and to correct a somewhat prevalent misconception that the government of the United States is founded upon the Christian religion.

In writing this review, I will endeavor to confine it to an academic discussion with the exception of the reference to the attitude of Dr. Read and Charles E. Roberts, Esq. And, as so many of our citizens have a misconception of my attitude, I will again reiterate my previous statements that I am not an atheist nor an agnostic. *I fully, deeply and keenly realize that religion is the warp and woof of society. I also realize that the surest method to destroy that fabric is to permit religion to become a part of the functions of civil government.*

I am not a Seventh Day Adventist, neither am I an Old School Baptist. I, however, refuse to ignore the psychological fact that attempts to coerce the conscience result, as they always have resulted, in reversing man's thoughts and actions from a mildly affirmative or passive state to a resistive and rebellious state; that compulsory Sunday observance laws and the attempts of some well-meaning persons to have them enforced have materially discouraged church attendance and have done immeasurable harm to the cause of true religion.

I also believe that Sunday religious observance laws are not in accordance with the Divine Will. I quote the expressions of four men who wielded an immense influence for good in their life-time:

> "Christianity was never intended to be enforced by law, but only in foro conscientæ; and all attempts at compulsion are now, and always were, diametrically opposed to the teachings

of the Author of Christianity. Religious legislation is the heritage that has been handed down to us from pagan times; and in all these laws can be seen the pagan superstitions." —*Thomas Jefferson,* quoted in Blakely's American State Papers, p. 224.

"When religion is good, it will take care of itself; when it is not able to take care of itself, and God does not see fit to take care of it, so that it has to appeal to the civil power for support, it is evidence in my mind that its cause is a bad one."—*Benjamin Franklin.*

"If the Sabbath Day be of God, it does not need legislation to uphold it. There is no power which can prevail against it."—*William Lloyd Garrison,* noted editor and president of the New England Anti-Slavery Society.

"As to getting the law of the land to touch our religion, we earnestly cry, 'Hands off! leave us alone!' Your Sunday bills, and all other forms of Act-of-Parliament religion, seem to me to be all wrong. Give us a fair field and no favor, and our faith has no cause to fear. Christ wants no help from Cæsar. I should be afraid to borrow help from government; it would look to me as though I rested on an arm of flesh, instead of depending on the living God. Let the Lord's day be respected by all means, and may the day soon come when every shop shall be closed on the Sabbath; but let it be by force of conviction, and not by force of policemen; let true religion triumph by the power of God in men's hearts, not by the power of fines and punishments."—*C. H. Spurgeon,* renowned English Baptist clergyman.

The Church has a divine mission in arousing and guiding the conscience in religion and morals. No one can question the right and duty of the clergy to authoritatively speak on spiritual subjects and to persuade their church members to observe Sunday in accordance with their religious creed. But the duty of the civil government is to protect its citizens in the enjoyment of their inherent rights, so aptly expressed in the Declaration of Independence as Life, Liberty and the pursuit of happiness. Liberty in its broadest sense—Liberty of Conscience, Religious Liberty, Civil Liberty. Man being endowed by his Creator with these inalienable rights, the State cannot invade them, except to punish every individual invader of the personal rights of another.

"The State, therefore, is not divinely authorized to legislate on any religious question. When it does thus legislate, it steps

outside the bounds of civil government, trenches upon the God-given rights of its citizens, enters the domain of the Deity, assumes divine authority, seats itself in the temple of God, and dares to do by civil legislation that which God declined to do through His gospel of love—force obedience to religious institutions."—*H. W. Cottrell,* in "Liberty" (a magazine of religious freedom, published by the Seventh Day Adventists).

Sunday is Not the Mosaic Sabbath

I was humorously impressed with the statement contained in Dr. Read's "Programs and Policies," as follows: "I have the highest admiration for the Jewish people as a whole. They believe in God. They believe in God's Holy Day." That is theologically accurate. However, the election returns from the Third and Fourth Wards show that this unctious utterance was not accepted as political manna.

And it is wise and proper to emphasize at this time the incontrovertible fact that the election in Mercer County was not a Democratic victory. The vote in those election districts of the First, Second, Sixth, Tenth, Twelfth, Thirteenth and Fourteenth Wards, where the Protestant Church citizenry predominate, shows that the citizens in those districts joined with their fellow citizens in other sections of the city in repudiating bigotry and in rebuking intolerance and social hatred.

But Dr. Read either mixed his metaphors or showed his woeful lack of common knowledge when he published the following statement:

"It so happens that a small, grasping group of Jewish people —aided by an equally greedy group of Gentiles—is seeking to overthrow the American Sabbath and turn Sunday—ordained by Almighty God through Moses—into a day of orgie and money making."

The Sabbath "ordained by Almighty God through Moses" was not the American Sabbath nor the Sunday observed by most of the Christian sects—it was and is indisputably the seventh day of the week.

A few sophists claim that the days of the week were lost in the story of humanity. But they overlook the fact that the Jews were observing the seventh day of the week when Christ's discipline plucked and ate the ears of corn and the Pharisees said unto Him: "Behold, why do they on the Sabbath Day that which is not law-

ful?" And He said unto them: *"The Sabbath was made for man and not man for the Sabbath."*

Christ knew God's will, and if the Jews were in error as to the day, He would have corrected them. And the chronicle of the days of the week have not been lost since that event.

Dr. Read is not the only one who has overlooked the provisions of the entire commandment. Charles E. Roberts, Esq., in his published statement, makes the same error as have many persons with the best intentions. The entire commandment is:

> "Remember the Sabbath Day to keep it holy; six days shalt thou labor and do all thy work. But the seventh day is the Sabbath Day of the Lord, thy God; in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy man-servant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates; for in six days the Lord made heaven and earth, the sea and all that in them is, and rested on the seventh day; wherefore the Lord blest the Sabbath Day, and hallowed it."

That part of the commandment, "six days shalt thou labor," is equally imperative with the injunction "remember the Sabbath Day to keep it holy."

Both Dr. Read and Charles E. Roberts, Esq., preferred to ignore the organic law of Christianity, the New Testament. Will they, therefore, kindly designate the part of the commandment which they deem it necessary for the Jews, the Seventh Day Adventists and the Old School Baptist to observe and the part thereof to break?

The Criminal Court of Appeals of Oklahoma stated the case very concisely as follows:

> "Courts which hold that to require Sabbatarians to keep our Sunday does not prevent them from also keeping the seventh day, overlook the fact that under the divine commandment that these people are striving to obey, it is as imperative that they work six days as that they rest on the seventh. And that if their conscience compels them to rest one day and the law also forces them to rest another, they will thus be forced to violate the first provision of the commandment they are conscientiously attempting to keep."—*Oklahoma Criminal Reports,* Vol. 12, p. 566.

Based on this same principle, the California Supreme Court ruled:

> "The Constitution, when it forbids discrimination or preference in religion, does not mean merely to guarantee toleration, but religious liberty in its largest sense, and a perfect equality

> without distinction between religious sects. The enforced observance of a day held sacred by one of these sects is a discrimination in favor of that sect, and a violation of the religious freedom of the others."—9 Cal. 502.

Cooley, the authority on Constitutional law, discusses this question at length. I quote in part:

> "There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle, it is enough that it creates an inequality of right or privilege."—*Cooley,* "Constitutional Limitations," fifth edition, p. 580.

Ancient Sunday Laws

There is no historic record of any Sunday laws during the first three centuries of the Christian era. Compromises of all sorts were made with heathen rites and a pagan state. Especially was this true of Mithraism. Mithras was a deity of the ancient Persians, the God of Light or of the Sun, who was worshiped as the ruler of both the material and spiritual universe. This belief was transmitted to the Roman world during the first century B. C. Constantine, the Great, Emperor of the Roman Empire, seeing an opportunity to please both the pagans and Christians, issued in 321 A. D. the following decree:

> "Let all the judges and townspeople, and the occupation of all trades, rest on the *venerable day of the sun;* but let those who are situated in the country, freely, and at full liberty, attend to the business of agriculture; because it often happens that no other day is so fit for sowing corn and planting vines; lest the critical moment being let slip, men lose the commodities granted of heaven."—*Codex Justin,* lib. III, tit. XII, 1, 3.

The Church Council of Nicaea, in 325 A. D., legislated for the first time in favor of Sunday observance, by requiring all Christians to observe Easter annually on Sunday, instead of, as previously, on the same day as the Jewish Passover, which being regulated by the moon, fell upon different days of the week in different years. The

Council of Laodicea, held in 364 A. D., in its twenty-ninth canon, sought further to honor Sunday by an attempt to abolish the observance of Saturday, the seventh day, among Christian believers, forbidding them to "be idle" except on Sundays.

There is some historical dispute as to the date of the commencement of the observance of Sunday in commemoration of the Resurrection of Jesus Christ. Lecky (History of European Morals, Vol. 2, p. 244) states, "The celebration of the first day of the week in commemoration of the Resurrection and as a period of religious exercises dates from the earliest age of the Church." While Chief Justice Clark, of the Supreme Court of North Carolina, in his judicial review of Sunday legislation, says:

> "As late as the year 409 A. D. two rescripts of the Emperors Honorious and Theodosius indicate that Christians then still generally observed the Sabbath (Saturday, not Sunday). The curious may find these set out in full, 'Codex Justin,' lib. 1, tit. 9, CX 13. Not till near the end of the ninth century was Sunday substituted by law for Saturday as the day of rest by a decree of the Emporer Leo (Leo Cons., 54)."—*North Carolina Reports,* Vol. 134, pp. 508-515.

At a church convention held at Carthage in 401, the bishops passed a resolution to send up a petition to the emperor, praying "that the public shows might be transferred from the Christian Sunday and from feast days to some other days of the week."

The reason given in support of the petition was:

> "The people congregate more to the circus than to the church, and it is not fitting that Christians should gather at the spectacles, since the exercises there are contrary to the precepts of God; and if they were not open, the Christians would attend more to things divine."—*Neander's "History of the Christian Church"* (edition 1852), Vol. 2, p. 300.
>
> "In the year 425, the exhibition of spectacles on Sunday, and upon the principal feast days of the Christians, was forbidden, in order that the devotion of the faithful might be free from all disturbance. In this way, the church received help from the state for the furtherance of her ends, which could not be obtained in the preceding period. But had it not been for that confusion of spiritual and secular interests, had it not been for the vast number of mere outward conversions thus brought about, she would have needed no such help."—Id., p. 301.

Charlemange, in the year 800, made a "civil" Sunday law, compelling all people, whether religious or non-religious, to attend church on Sunday. His law reads as follows:

> "We do ordain, as it is required in the law of God, that no man shall do any servile work on the Lord's day * * * but that they all come to church to magnify the Lord their God."—*"The Sabbath of Man," Wilbur F. Crafts,* p. 556. (A well-known advocate of Sunday laws.)
>
> "The Saxon laws under Ine (about A. D. 700) forbade working on Sunday, but under Alfred (A. D. 900) and Athelstane (A. D. 924), the prohibition was merely against marketing on Sunday, and there seems to have been no statute against working on Sunday (whatever the Church may have enjoined) until Charles II, in 1678, the first part of which is almost similar to the Colonial Statutes of America. Indeed, it appears from the records of Merton College, Oxford, that at its Manor of Ibstone, in the latter part of the Thirteenth Century, contracts with laborers provided for cessation from work on Saturdays and holidays, but it was stipulated that work should be done in regular course on Sundays. Thorold Rogers' 'Work and Wages,' Chapter 1. Indeed, it seems that this was usual in England until the time of the Commonwealth and the rise of the Puritans to power, but it was not enacted into law until the statute of Charles II above referred to."—*Chief Justice Clark, N. C. Reports,* Vol. 134, pp. 508-515.

The further development of Sunday laws will be found in Lewis' "Sunday Legislation," but it is or should be of interest to all of us to familiarize ourselves with the history of the Sunday observance enactments of the American Colonies. Space necessitates brevity, and I will, therefore, confine my statements to the province of New Jersey and the provinces of East New-Jersey, West-Jersey, the Royal Province of New Jersey, Virginia, Massachusetts, Plymouth and New Haven Colonies, and limit my remarks, in so far as is practical, to compulsory church attendance and compulsory religious worship, otherwise the review would be too voluminous.

Those who may desire further information (and the Blue Laws of Plymouth Colony, Massachusetts Bay, Connecticut, New Haven Colony, and the Royal Province of New Jersey, are interesting) should read Grants, Concessions and Original Constitutions of the Province of New Jersey, by Leaming and Spicer, Documents Relating to the History of the State of New Jersey, edited by William A. Whitehead, corresponding secretary of the New Jersey Historical Society; and

Hutchinson's History of Massachusetts, Plymouth Colony Records, Colonial Records of Connecticut and New Haven Colony Records, but a perusal of Bancroft's History of the United States and "Critical Period of American History," by John Fiske, should suffice for the ordinary reader. "Ye Olden Blue Laws," by Gustavus Myers, the Century Company, is an entertaining and instructive book.

Colonial Sunday Laws

The colony of Virginia enacted in 1617 (three years before the landing at Plymouth) the first Sunday law in America, as follows:

> "Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day, and in the afternoon to divine service, and catechizing, upon pain for the first fault to lose their provision and the allowance for the whole week following; for the second, to lose the said allowance and also be whipped; and for the third, to suffer death."—*Articles, Laws, and Orders, Divine, Politique, and Martial, for the Colony in Virginia.*

The second Sunday law, 1623, declared:

> "Whosoever shall absent himself from divine service any Sunday, without any allowable excuse, shall forfeit a pound of tobacco, and he that absenteth himself a month shall forfeit fifty pounds of tobacco."—*Hening's "Statutes at Large,"* Vol. 1, p. 123.

The Church of England, Episcopal, was the establish religion. Bancroft states that non-conformists were banished from the colony, also that all Quakers were banished, and their return regarded as a felony.

Several acts of the Virginia Assembly of 1659, 1662 and 1693 had made it penal in parents to refuse to have their children baptized.—*Thomas Jefferson in "Notes on Virginia,"* 1788, p. 167.

> The Massachusetts Sunday law of 1671 provided that "whosoever shall frequently neglect the public worship of God on the Lord's day, that is approved by this government, shall forfeit for every such default convicted of, ten shillings, especially where it appears to arise from negligence, idleness or prophaneness of spirit." (See "Book of the General Laws of New Plymouth," published by the General Court, June 6, 1671, chap. 3, sec. 10.)
>
> A civil officer known as the "tithing-man" was appointed by the government to see "that no young people walked abroad

> on the eve of Sabbath." He also "marked and reported" all those "who lye at home" and others who "prophanely behaved," "lingered without doors at meeting time on the Lordes Day," all the "sons of Belial strutting about, sitting on fences and otherwise desecrating the day." These offenders were first admonished by the "tithing-man," then "sett in stocks," then "cited before the court." They were also "confined in the cage on the meeting house green with the Lord's day sleepers." The tithing-man could arrest "any who walked or rode too fast a pace to and from meeting," and he could arrest any who "walked or rode unnecessarily on the Sabbath." "Great and small alike were under his control." (See "The Sabbath in Puritan New England," by Alice Morse Earle, p. 74.)
>
> In Massachusetts, as late as 1783, "the tithing-man still arrested Sabbath breakers and shut them up in the town cage in the market place; he stopped all unnecessary riding or driving on Sunday, and haled people off to the meeting house, whether they would or not. * * * The men of Boston strove hard to secure the repeal of these barbarous laws and the disestablishment of the Congregational Church, but they were outvoted by the delegates from the rural towns." —*"The Critical Period of American History,* 1783-1789," *by John Fiske,* pp. 76, 77.
>
> One of the peculiar laws of Massachusetts provided "so any sin committed with a high hand, as gathering of sticks on the Sabbath day, may be punished with death, when a lesser punishment might serve for gathering sticks privily and in need."—*"Records of Massachusetts Bay,* Vol. 11, p. 93."
>
> Hutchinson's History of Massachusetts, Vol. 1, p. 390, says: "Divers other offenses were made capital, viz., profaning the Lord's day in a careless or scornful neglect or contempt thereof." (Numbers 15: 30-36.)

Bancroft's History of the United States recites the fact that in Massachusetts the elective franchise was narrowed so as to exclude non-communicants, thereby creating a theocracy, a form of government in which the affairs of men, whether temporal or spiritual, civil or religious, are united under the control of God.

The New Haven Colony records, 1653-1655, p. 605, contain a similar provision "that profaning the Lord's day by sinful servile work or unlawful sport, recreation or otherwise, whether willfully or in a careless neglect shall be duly punished by fine, imprisonment, or corporally, according to the nature and measure of such sin and

offense;" providing further, that if "the sin was proudly, presumptuously and with a high hand committed," such person "shall be put to death."

Plymouth Colony (records Vol. XI, p. 214) made it punishable by imprisonment in the stocks to go to sleep in church, which was somewhat of a hardship as the sermons were from two and one-half to three hours' duration. On June 10, 1650, the same colony made it punishable by whipping to do "any servile work or any such like abuse" on the Lord's day.

The laws prohibiting recreation on Sunday and certain amusements on weekdays caused a majority of the people to resort to devices to evade them. Some of the punishments for infractions were pathetic on account of their extreme cruelty, and some of the evasions were amusing. The successful effort to stage plays, notwithstanding the prohibition against such productions on weekdays, led to the use of clever subterfuges. A Philadelphia historian says: "Thus the 'Gamester' was announced as a serious and moral lecture in five parts on the vice of gaming, while 'Hamlet' was introduced as a moral and instructive tale called 'Filial Piety Exemplified in the History of the Prince of Denmark.'"

Brief History of New Jersey

To properly comprehend the laws of the Province of New Jersey and the Provinces of East New-Jersey and West-Jersey and the Royal Province of New Jersey, it is necessary to give a brief history of New Jersey up to the year 1702, the date when the proprietors surrendered their civil rights to the Crown.

The history of the early settlement of New Jersey is quite interesting. Its early inhabitants were, perhaps, more diversified than those of any other colony. The Dutch West India Company was the first to send over planters. Holland claimed the valleys of the Delaware and Hudson, by reason of the explorations of Hendrik Hudson. As early as 1630, they had a local government located in what is now New York City. In 1638, Sweden sent out farmers and traders who settled in what is now the State of Delaware, along the Schuylkill River and along the Delaware River. In 1655, the New Netherlands conquered New Sweden and retained control until 1664.

In March, 1664, Charles II, King of England, deeded to his brother, James, Duke of York, an exceedingly large tract of land consisting of much of what is now New England, New York and New Jersey, and gave "absolute power to govern and rule according to such laws * * * as by our said dearest brother or his assigns, shall be established * * * so always as the said statutes be not contrary to, but as near as conveniently may be agreeable to, the laws, statutes and government of this our realm of England."

On June 24, 1664, James, Duke of York, deeded to John, Lord Berkeley, and Sir George Carteret (designated in subsequent written instruments as the Lord's Proprietors) the lands of what is now the State of New Jersey, together with other lands. In honor of Carteret's defense of the island of Jersey (Caeserea) during the Parliamentary Wars, the territory was called New Jersey (Nova Caesera). In 1673, New Jersey was recaptured by the Dutch, who held it until 1674.

In 1673, John, Lord Berkeley, sold "all that moety or half part of him, the said John Berkeley, in the said tract of land * * * then called by the name of New Caeserea or New Jersey" to John Fenwick. In 1674, John Fenwick (and Edward Billinge, who claimed to have an equitable interest) sold their portion to William Penn, Gawn Lawry (signed by him to the charter or fundamental law of West Jersey, Gawen Laurie) and Nicholas Lucas.

On July 1, 1676, Sir George Carteret, William Penn, Gawn Lawry, Nicholas Lucas and Edward Billinge entered into a Quintipartite Indenture by which a partition of New Jersey was affected—the easterly part thereof being assigned to Sir George Carteret "from henceforth to be called by the name of East New-Jersey," and the westerly portion being assigned to William Penn, Gawn Lawry and Nicholas Lucas, "from henceforth to be called by the name of West-Jersey." And thereafter the civil control was separate and distinct until 1702.

After the death of Sir George Carteret, East New-Jersey became the property of twenty-four proprietors, by virtue of the will of Carteret, the sale by his executrix and the release of the Duke of York dated March 14, 1682, and thereafter the civil control of East New-Jersey became vested in these proprietors until 1702.

Internal troubles between the boards of proprietors and the small land owners and the claim of the crown that the Lord Proprietors and the Board of Proprietors had never been delegated with civil authority, as set forth in the deed from Charles II to his brother, the Duke of York, and his assigns, induced the Board of Proprietors, on April 15, 1702, to surrender to the crown their rights of government, retaining their interest in the soil. This was accepted by

Anne, Queen of England, and the provinces of East New-Jersey and West-Jersey became the royal province of New Jersey and remained so until the Revolutionary War. Queen Anne thereupon appointed Edward Lord Cornbury Captain-General and Governor of New Jersey and constituted certain persons members of the council, and directed that the first general assembly be called at Perth Amboy "and afterwards the same or the next general assembly at Burlington; and that all future general assemblies to set at one or the other of those places alternately." By her instructions, she further directed that the assembly should consist of twenty-four representatives, limiting the selection of representatives to be chosen to such persons as shall own not less than one thousand acres of land, and further provided that only freeholders owning one hundred acres of land should be permitted to vote for representatives. (The quotation marks indicate that the substance thereof is quoted from copies of the original documents.)

(The page numbers in the following recitals refer to The Grants, Concessions and Original Constitutions, etc., by Leaming and Spicer, unless otherwise noted.)

Religious Toleration by the Lords Proprietors

Religious toleration was granted in the province of New Jersey by the Lord's Proprietors (p. 14). They granted to the general assembly by their first concession, power "by act" to "appoint such and so many ministers or preachers as they think fit, and to establish their maintenance, giving liberty besides to any person or persons to keep and maintain what preachers or ministers they please" (p. 14). This was subsequently amended in 1674 by giving to the Governor and Council power to approve of the ministers and to establish their maintenance (p. 55). They allotted "to each parish for the use of their ministers 200 acres, in such places as the general assembly shall appoint" (p. 25).

The Fundamental Constitution for the Province of East New-Jersey, granted by the twenty-four Proprietors in 1683, provided: "Nor shall they (the inhabitants) be compelled to frequent and maintain any religious worship, place or ministry whatsoever * * * provided, that no man shall be admitted a member of the great or common council or any public place of public trust, who shall not confess faith in Christ Jesus * * * nor by this article is it intended that any under the notion of this liberty shall allow themselves to

avow atheism, irreligiousness * * * or indulge themselves in stage plays, masks, revels or such like abuses" (p. 162).

The right of freedom of worship was limited by an act of general assembly of East New-Jersey in 1698, as follows: "Provided this shall not extend to any of the Romish religion, to exercise their manner of worship contrary to the laws and statutes of His Majesty's Realm of England" (p. 372).

The Assembly of the Province of East New-Jersey was not as tolerant as were the Lords Proprietors. Dissenters were required to subscribe to oaths of allegience, supremacy and abjuration. See appendix, Journal of Governor and Council of East New Jersey, New Jersey Archives, First Series, Vol. XIII, p. 295.

A committee of the Board of Proprietors of East New-Jersey issued instructions, dated London, April 14, 1698, to Governor Basse, instructing him "not to consent to a law for imposing * * * salary, tax or allowance for the maintenance of any sort of preachers or ministers whatsoever persuasion they may be of in the matter of religion" (p. 221).

The Charter or Fundamental Laws of West-Jersey, agreed upon by the Proprietors and Freeholders March 3, 1676, provided, among other things:

> "Chapter XV. That no men nor number of men upon earth, hath power or authority to rule over men's consciences in religious matters, therefore it is consented, agreed and ordained, that no person or persons whatsoever within said province at any time or times hereafter shall be anyways, upon any pretense whatsoever, called in question, or in the least punished or hurt, either in person, estate or privilege, for the sake of his opinion, judgment, faith or worship towards God in matters of religion * * *" (p. 394).

The General Assembly re-affirmed the above privilege November 25, 1681, and further provided:

> "and that none of the free people of said province shall be rendered uncapable of office in respect of their Faith and Worship" (p. 425).

This was the most liberal declaration, grant and enactment made by any civilly constituted authority in those early days. However, before any person could assume public office, he was required to take an affirmation of allegience to the Crown and to the Province, and subscribe a declaration of profession of the Christian faith. (Act of 1696, p. 549.)

The instructions issued by Queen Anne November 16, 1702, to Lord Cornbury, Governor of the Royal Province of New Jersey, provided, in part:

> "51. You are to permit a Liberty of Conscience to all persons (except Papists) so they may be contented with a quiet and peaceable enjoyment of the same, not giving offence or scandal to the Government" (p. 633).
>
> "You shall take especial care, that God Almighty be devoutly and duly served throughout your Government, the Book of Common Prayer as by law established, read each Sunday, and Holy Day, and the Blessed Sacrament administered according to the rites of the Church of England" (p. 638).

The instructions further provided that a competent maintenance be assigned to the minister of each Orthodox Church, and that a convenient house be built at the common charge for each minister and a competent proportion of land assigned to him for a glebe. The Governor was further instructed not "to prefer any minister to any ecclesiastical benefice without a certificate from the Right Reverend Father in God, the Lord Bishop of London, of his being conformable to the doctrine and discipline of the Church of England" (p. 638-639).

Compulsory Worship Attempted

I have been unable to find any law compelling attendance at worship on Sunday either in the Province of New Jersey, the Province of East New-Jersey, the Province of West-Jersey or the Royal Province; but at least one such Act was contemplated in the Province of East New-Jersey as appears by the following: (For the sake of clarity, the spelling is corrected.)

> "At a Council held the 24th of March, A. D. 1682-3. Present: The Deputy Governor, Captain Berry, Captain Palmer, Captain Sandford and Benjamin Price, of the Council. Captain Sandford had leave to go home this morning. The Deputies sent up here a bill for the better observation and keeping holy the first day of the week or Lord's Day, which being read, the Council agreed not therewith, having these exceptions thereto, viz.:
>
> "1. There is an Act already that sufficiently provides for abstinency from daily labor.
>
> "2. This enforces people by pains and penalties to worship whether their worship be true or false; if false, better none than any. Better to be silent than to offer the sacrifice of fools. The worship of the wicked is abomination to the Holy God.
>
> "3. The Bill obliging all persons to worship in public or private or pay 5d. Every person who has not witness of his private worship (which is much if he has any) must pay 5d. It seems unreasonable to take witness for private worship.
>
> "4. This Bill insinuates as if the first day were holy, which the Holy Scriptures never said more than any other. Every day is Holy to the Lord. He has no profane days. But the Holy Scriptures say he that regards a day regardeth it unto the Lord and he that regardeth not, etc. Rom. 15.5.6. If one man esteem a day above another, another esteems every day alike. Let every man be fully persuaded in his own mind. Liberty of conscience ought to be preferred and licentiousness punished, which this Bill seems not equally to secure." (New Jersey Archives, First Series, Vol. XIII, p. 36.)

It appears from this journal that William Penn, one of the twenty-four proprietors of East New-Jersey, sat with the Council on a number of occasions. He was also one of the proprietors of West-Jersey, as has been heretofore stated.

First Sunday Observance Law in the Province of New Jersey

The first Sunday observance law was enacted December 2, 1675, before the division, and is as follows:

> "XI. It is further enacted by this assembly, that whosoever shall profane the Lord's Day, otherwise called Sunday, by any kind of servile work, unlawful recreation, or unnecessary travels on that day, not falling within the compass of mercy or necessity either willfully or through careless neglect shall be punished by fine, imprisonment or corporally, according to the nature of the offense * * *" (p. 98).

The first Sunday Observance Law enacted by the General Assembly held at Elizabethtown, in the province of East New-Jersey, March 3, 1676, provided:

> "XXVIII. That according to the good example of the primitive Christians and for the ease of the Creation, every first day of the week called the Lord's Day, people shall abstain from their common daily labor that they may the better dispose themselves to worship God according to their understanding" (p. 237).

Set in Stocks for Profaning Lord's Day

In 1682, the General Assembly of the Province of East New-Jersey passed an Act entitled, "Against Prophaning the Lord's Day." This Act prohibited traveling "on foot or horseback or on any pretended journey or to ride on 'horse hunting' or 'beast hunting' or to ride from town to town or elsewhere except to and from religious exercise or matter or thing of necessity." It also forbade any work or ordinary trade or "gaming, sporting or playing at or in any games, sports or plays or be found in any other exercise than sober and religious exercise (works and things of necessity only excepted)." The Act provided that a penalty of five shillings for the first offense and ten shillings for every subsequent offense be imposed, to be levied by distress and sale of the offender's goods. It authorized the Justice to give one-third of the fine to an informant and that if distress could not be had, then the Justice "may by his warrant cause such offender to be *set in the stocks* for the space of two hours; and if the offender failed to give recognizance for good behavior, the Justice was empowered to commit the offender to the "common gaol * * * there to remain until the next session of the Peace" (p. 245).

The Sunday Observance Law of the Governor, Council and Representatives of West-Jersey, passed October 3, 1693, provided:

"An Act for Preventing Profanation of the Lord's Day."

"Whereas it hath been the practice of Christian professors to set apart one day in the week for the worship and service of God, and that it hath been and is the ancient law of England (according to the practice of the primitive Christians) to set apart the first day of the week to that end, and finding by experience that the same good practice and law hath been greatly neglected in this Province, to the grief of such as professed the Christian religion and to the scandal thereof, be it therefore enacted * * * that if any person or persons * * * shall within this Province be found doing any unnecessary servile labor, or shall travel upon the Lord's Day, or first day (except to some religious service or worship or otherwise in case of necessity), or shall be found tippling, sporting or gaming, thereby profaning the Lord's Day or first day, shall upon conviction * * * forfeit and pay for every such offense six shillings * * * to be levied by distress * * * and if such distress cannot be found and taken, then to imprison such offender or offenders until he or they shall pay the same" (p. 519).

The first Sunday Observance Law by the General Assembly of the Royal Province held at Burlington was passed December 12, 1704. The Act was entitled, "An Act for Suppressing of Immorality." This Act increased the time of confinement in stocks for breaking the Lord's Day from two to four hours. (Allison's Laws, p. 1.)

Object of Blue Laws—To Promote Religion

In 1790, the Legislature of the State of New Jersey passed an Act entitled, "An Act to Promote the Interest of Religion and Morality and for the Suppressing of Vice Among All Ranks of People Within This State." This law included the provisions of most of the preceding laws and prohibited the drawing of a seine or net and the running of stage coaches. (Laws 1787-1795, p. 619.)

In 1798, an Act was placed on the Statute Books entitled, "An Act for Suppressing Vice and Immorality" (p. 399). This Act contained about the same provisions as our present law, with a few exceptions. It contained an exemption for persons who "religiously observed" the seventh day of the week as the Sabbath from answering any process in law, except in criminal cases. It also provided for the discharge of persons charged with having labored or worked on Sunday who were able to prove that they uniformly kept the seventh day of the week as the Sabbath and habitually abstained from following their usual occupation or business and from all recreation, and who devoted the day to the exercise of religious worship," providing that nothing therein contained should be construed to allow such person to openly expose to sale any goods * * * or article whatsoever in the line of their business or occupation.

It will be noted that there is a distinct change in the title from the preceding acts. Doubtless, the legislators realized that the titles of former acts were repugnant to certain constitutional principles. These will be covered in another article.

By a supplement to said Act, passed in 1811 (p. 309), a penalty was provided for disturbing religious worship on Sunday. The revision of 1846 provided for confinement not exceeding ten days in jail for infractions, providing the fine imposed was not paid and distress could not be had. It omitted the penalty of placing the offender in stocks, doubtless for the reason that this form of penalty was considered repugnant to the constitutional provision of the State that cruel and unusual punishment shall not be inflicted.

Operation of Freight and Passenger Trains Prohibited

A further supplement of 1854 prohibited transportation of freight, excepting milk, on any public highway, railroad or canal; and by a further supplement in 1873, it was made lawful for any railroad company "to run one passenger train each way over their roads on Sunday for the accommodation of citizens of this State."

In 1893, an amendment to the Act made it "not unlawful * * * to print, publish and sell newspapers, to sell and deliver milk, or to walk, ride or drive for recreation and to hire horses and carriages or other conveyances for riding or driving," and empowered the governing body of municipalities to adopt ordinances to regulate or prohibit the acts thereby made not unlawful, and to prescribe fines and penalties for the violation of the same.

In my previous articles I have endeavored to show that the Church departed from the pure principles of religion, and for centuries it was a component part of the state—sometimes the ruler of the state. The English Puritans and many of the other colonists came to this country to secure religious liberty. They secured their form of religious liberty but denied religious and civil liberty to those of other faiths.

Roger Williams First to Declare for Civil Liberty

Some brave men in the early days of the colonies advocated religious toleration, but the credit of the advocacy of religious and civil liberty rightfully belongs to Roger Williams. He knew that toleration is a concession—a gift of man; that liberty is an inherent right—a gift from God. In those days when idolatry and witchcraft were capital crimes; when the Church practically controlled the civil authority; when men were whipped and set in stocks for refusing to attend church services, and when dissenters were hung, Williams bravely stated: "The magistrate has no right to punish a breach of the Sabbath." Memoirs of Williams, by Knowles, p. 45. Williams was a preacher at Salem. Both he and the members of his church were disfranchised. He was subsequently compelled to flee from Massachusetts and, as is well known, founded Providence Plantation. Williams advocated the total separation of Church and State, and religious freedom for all men. He made God the only Lord of conscience, the only regulator of our duty in religious matters and the

only Judge of our religious condition. Bancroft says: "He was the first person in modern Christendom to exert in its plenitude the doctrine of the liberty of conscience—the equality of opinions before the law."

As the colonies grew in population, the people became more insistent for a larger degree of individual, civil and religious freedom. The Revolutionary War accentuated the desire for religious liberty. Thomas Jefferson, James Madison and others in Virginia had been agitating for a Bill of Rights and citizens of the other colonies were also insisting upon asserting their civil and religious liberty.

Bill of Rights and United States Constitution

The reiterated demands could not be ignored. Conventions were assembled and Bills of Rights adopted. Brevity will only permit of a recital of two. Virginia, in its famous Bill of Rights of 1776, declared:

> "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience."

The Charter Rights of New Jersey of 1776 provides:

> "That no person shall ever within this colony be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatsoever, compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person within this colony ever be obliged to pay tithes, taxes or any other rates, for the purpose of building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.
>
> "That there shall be no establishment of any one religious sect in this province in preference to another; and that no *Protestant* inhabitant of this colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any *Protestant* sect, who shall demean themselves peaceably under the government as hereby established, shall be capable of being elected into any office of profit or trust, or

being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity enjoyed by others their fellow-subjects."

The Articles of Confederation and perpetual union between the states, adopted November 15, 1777, by the delegates of the United States in Congress assembled, did not contain any declaration as to freedom of religious worship. These Articles having proved to be entirely inadequate, the convention of 1787 was called in Philadelphia to frame a National Constitution. The convention was summoned because of a resolution of Congress passed at the instigation of the Annapolis convention, calling upon the states to send delegates to meet in Philadelphia the second Monday of May "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several Legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

For five months the members sat in council, drafted the United States Constitution, and sent it to the states for ratification as the supreme law of the land. As thus ratified, it contained a clause which read:

> "No religious test shall be required as a qualification to any office or public trust under the United States."—Article VI, third section.

Jefferson, who was in Europe at the time of the Constitutional Convention, wrote a letter to Madison in 1787 in which he told, as follows, what he did not like in the new Constitution:

> "I do not like, first, the omission of a bill of rights, providing clearly, and without the aid of sophisms, for freedom of religion, freedom of the press, protection against standing armies. * * * A bill of rights is what the people are entitled to against every government on earth."—*"The Jeffersonian Cyclopedia,"* p. 88.

James Madison, a member of the First Congress (afterwards President of the United States), proposed in that Congress ten amendments to the Constitution in behalf of the contention of a number of the states that had ratified the Constitution.

The original draft of the First Amendment read as follows:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience

be in any manner, or on any pretext, infringed."—*"Annals of Congress,"* Vol. 1, col. 434.

In the debate that followed, Madison said he apprehended the meaning of the words to be that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.—Id.

Again: "He (Madison) believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."—Id., col. 731. Quoted from "Liberty."

The Amendment as adopted provides:

> "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of their grievances."

Bancroft makes the following illuminating comment on the fact that the Constitution of the United States contains no acknowledgment of the Christian Religion:

> "The American Constitution, in harmony with the people of the several States, withheld from the federal government the power to invade the home of reason, the citadel of conscience, the sanctuary of the soul; and not from indifference, but that the Spirit of eternal truth might move in its freedom and purity and power."
>
> "Under the American flag, the rights of the Jew and the Mohammedan were as secure as those of the Christian. The fearful fruits of state-intrenched religious bigotry and intolerance had taught men wisdom."

Government of the United States Not Founded on Christian Religion

Many persons have the erroneous belief that the government of the United States is founded upon the Christian Religion. As showing the contemporaneous construction of the Federal Constitution, it is well to recall that one of the first treaties of peace made by the United States—that with Tripoli, which was sent to the Senate with the signature of George Washington, began with these words—"As the Government of the United States of America is not in any sense founded on the Christian Religion."—*American State Papers,* Class 1, Foreign Relations, Vol. II, p. 18.

This Treaty was ratified by the Senate. George Washington had been President of the Convention that framed and adopted the Constitution. He had heard the debates on each and every provision incorporated therein. Therefore, no man could speak more authoritatively than he as to the intent of the framers of the Constitution, pronounced by William E. Gladstone to be "the most wonderful work ever struck off at a given time by the brain and purpose of man."

It should be unnecessary to adduce further proof of the statement that the Federal government is not founded upon the Christian Religion, but as this is a very vital question, I will present two other citations.

Between the years 1810 and 1829, Congress received petitions to stop Sunday mails. Finally, in 1829, the Senate Committee on Post-Offices and Post-Roads made the following report:

> "Should Congress in its legislative capacity adopt the sentiment (of the petitioners), it would establish the principle that the legislature is a proper tribunal to determine what are the laws of God. It would involve a legislative decision on a religious controversy, and on a point in which good citizens may honestly differ in opinion, without disturbing the peace of society or endangering its liberties. If this principle is once introduced it will be impossible to define its bounds * * * let the national legislature once perform an act which involves the decision of a religious controversy, and it will have passed its legitimate bounds. The precedent will then be established, and the foundation laid, for the usurpation of the divine prerogative in this country which has been the desolating scourge to the fairest portions of the Old World."—*"American State Papers,"* Class VII, pp. 225, etc.

Congress has made similar declarations. I quote a Report of the First Session of the Forty-third Congress (Report 143, House of Representatives):

> "The Committee on the Judiciary, to whom was referred the petition of E. G. Goulet and others, asking Congress for 'an acknowledgment of Almighty God and the Christian Religion' in the Constitution of the United States, having considered the matter referred to them, respectively pray leave to report:
>
> "That, upon examination even of the meager debates by the fathers of the Republic in the convention which framed the Constitution, they find that the subject of this memorial was most fully and carefully considered, and then, in that convention, decided, after grave deliberation, to which the subject was entitled, that, as this country, the foundation of whose government they were then laying, was to be the home of the oppressed of all nations of the earth, whether *Christian* or *Pagan,* and in full realization of the dangers which the union between church and state had imposed upon so many nations of the Old World, with great unanimity that it was inexpedient to put anything into the Constitution or frame of Government which might be construed to be a reference to any religious creed or doctrine.
>
> "And they further find that this decision was accepted by our Christian fathers with such great unanimity that in the amendments which were afterward proposed in order to make the Constitution more acceptable to the nation, none has ever been proposed to the States by which this wise determination of the fathers has been attempted to be changed. Wherefore, your committee report that it is inexpedient to legislate upon the subject of the above memorial, and ask that they be discharged from the further consideration thereof."

The advocates of Sunday Observance Laws are divided in two classes —those who believe in a sanctification of the day and those who have abandoned that claim as untenable and substituted the dogma that observance should be made compulsory to provide a day of rest.

Mental Attitude of Religious Zealots

The first class comprises the officers, members and followers of the Lord's Day Alliance. Their mental attitude is best described in a brief filed by George Wharton Pepper (now U. S. Senator from Pennsylvania), in the suit brought by Dr. Mutchler, Secretary of the Pennsylvania branch of that organization, for an injunction to enjoin the Park Commissioners of Philadelphia from permitting baseball in the public parks on Sunday. His brief, in part, states:

> "If the prohibition of 1794 still holds good in 1919, the methods of enforcing it provided in the Act should be pursued. The two belong together. The more gentle and merciful procedure of a Court of Equity is not in keeping either with the spirit of this Act or with the temper of the instigators of this legislation. * * * Let the prosecutors convict them if they can, and in default of fine lock them up at hard labor and on harder food. No doubt an arrangement could be made

to permit the instigator to look through the bars at the prisoners. *In 1794 no Orthodox enumeration could be made of the blessings of the saved which did not include a contemplation of the tortures of the damned."*

Court Decisions Uphold Sanctity of Sunday

Up to nearly the close of the 19th century, the courts of Pennsylvania, New York, Georgia, Alabama and a few other States recognized the *sanctity or solemnity* of the day. A New York judge referred to it as a *Holy Day* (4 Bos. N. Y., 298), while a decision by a Kentucky court states, concerning two statutes, that one applied exclusively to Sunday as *sacred* and the other to holidays as *secular*. (2 Duv., 437, 1866.) A decision stated: "When the statute of Georgia, therefore, exempts works of benevolence and charity from the operation of this penal statute, it but re-enacts *the laws of the Almighty* as announced by the Saviour and beautified by His example." (55 Ga., 244, 1875.)

The judicial standpoint was that offenses against the law were a desecration of Sunday. As an instance of the judicial view, a New York court held, "A public arrest may be a greater *desecration* of the Sabbath than the act for which it is made." (14 Barb., 425, 1852.) This was not an extreme view for that period. The Vice and Immorality Act of 1798 of this State prohibited the serving of any process, warrant, etc., on Sunday, except in criminal cases or a breach of the peace, and many of the provisions of our present Vice and Immorality Act provide that the violators shall be stopped and legal procedure taken the next day.

Most of the decisions are based upon the principle that the constitutions of such States adopted, by their language, the common and statutory law then in force in so far as is not repugnant to constitutional provisions and that under the established rules of construction, the common and statutory law and the constitutional provisions must stand if it be reasonably possible to so construe them.

In so far as this contention relates to the constitutions of the original thirteen colonies, I cannot conceive that the delegates to the constitutional convention that framed and adopted the Federal constitution, misrepresented their constituents, and I contend that the members of the legislatures of those States that ratified the constitution and the first Amendment thereto fully realized that the object thereof was not religious toleration, but religious freedom in its broadest sense. In ratifying the Constitution and the Amendment,

the members of the legislatures acted in accordance with the sentiment of the people of the several States in repudiating the provisions of the common and statutory laws creating religious standards. Therefore, it is inconceivable that the framers of the constitutions of the several States should depart from this generally accepted principle.

Historical Jurists

But this was the age of historical jurists who regarded juristic tradition as an inflexible rule, and they, therefore, failed to discern, as they frequently have failed to discern, a change in our social and economic fabric, and they continued to follow legal precedents mainly based upon the statute, 29 Car. 11, ch. 7, 1678, and were also influenced by their unswerving faith in the infallibility of Blackstone, the author of their first student legal textbook, who gives as *"the ninth offense against God and religion," "Profanation* of the Lord's Day, vulgarly (but improperly) called 'Sabbath-breaking.'" But Blackstone was not infallible, as is well known.

Shall Civil Authority Assume Ecclesiastical Functions?

To admit the correctness of the decisions applying *sanctity, sacred and holy,* to the observance of Sunday and *desecration* as applied to its non-observance only admits of the inevitable conclusion that Sunday can be so regarded solely on account of religious belief. If that be true, then the legislature has exercised ecclesiastical authority. It, therefore, follows:

> "For such laws the phrase *'Be it enacted'* is a meaningless formula, and *'Thus saith the Lord'* is the proper method of introduction."—*James T. Ringold, Esq.,* an advocate of Sunday observance laws, author of "Legal Aspects of First Day of the Week."

Shall we admit this attitude to be proper or desirable? I apprehend not. If we do, then the seventh day of the week is immutably fixed as the day to be kept holy in accordance with the Fourth Commandment, for we cannot ignore the fact that there is no requirement for observance of Sunday, or indeed any day, in the New Testament. The utterances of Jesus Christ as to the Sabbath were not in support, but in derogation, of the extreme observance of the Mosaic day of rest indulged in by the Pharisees.

Danger of Civil-Religious Laws

The danger of civil-religious laws is the assumption that the State can recognize any form of religion, thereby creating a union of religious and civil authority, with a recognition of the supremacy of religious authority on religious matters. If we admit that, it logically follows that a State religion can be established and then follows in logical sequence, compulsory church attendance, the franchise limited to communicants and a revival of the Theocracy of the Council of Geneva. I am fully aware that all of these are unconstitutional; but in view of the decisions I have cited, which are only a small proportion of numerous similar decisions, I feel that I have some justification for doubt as to the attitude of the courts, if the followers of the Lord's Day Alliance gained the supremacy. And constitutional amendments are more easily adopted now than was the case half a century ago. A majority of the readers of this article will think that a remote possibility. Of course, it was impossible for the early Christians to foresee that those professing Christianity would be divided into hundreds of sects, and Luther would have considered it a remote possibility that each sect would develop such a spirit of intolerance as to exceed in persecution that of the Pagans against the Christians.

History proves that civilization moves in cycles; and, while we can justly be proud of our progress in education and literature, in the arts and sciences, fanaticism in both civil and religious matters is showing unmistakable signs of increasing strength. Therefore, it is wise to act on the precept enunciated by John Philpot Curran—"Eternal Vigilance is the Price of Liberty."

Day of Compulsory Rest

About the commencement of the twentieth century, many jurists partly abandoned the historical rule and, consciously or sub-consciously, applied a combination of the analytical, historical, philosophical and socialogical norms to their adjudications. The legal doctrine of the sanctity of Sunday could not prevail against an impartial analytical test of the truth or falsity of Sunday being the Lord's Day; of a philosophical contemplation of the ethical and constitutional questions involved and a realization of the fact that law must conform to social progress if it is to endure. As a consequence, the doctrine of the sanctity of Sunday was abandoned and by judicial subtlety the intent of the act was declared to mean that

Sunday is set apart by the Vice and Immorality Act as a day of compulsory rest.

The Supreme Court of the United States sustained the principle that it is within the domain of the police power possessed by the States to make a day of rest compulsory, as a civil institution. In that case, the law of the State of Georgia prohibited the running of freight trains on Sunday. The law provided that the superintendent of transportation should be held liable for infractions. The superintendent was indicted. He pleaded guilty and averred that the statute of Georgia was in conflict with the Constitution of the United States, which gives Congress power to regulate commerce among the States. At the trial, it was admitted that the transportation of such freight originated in Tennessee, was transported through Georgia and taken into Mississippi. The trial judge instructed the jury that, under the facts admitted, the defendant was guilty, and he was accordingly convicted. An appeal was taken and the Supreme Court of Georgia held the statute to be a regulation of internal police power and not a regulation of commerce. On an appeal the Supreme Court of the United States held that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but is an ordinary police regulation designed to secure the well-being and promote the welfare of the people within the State of Georgia by which it was established. *Hennington* v. *Ga., U. S. R.,* 163, p. 299.

In the absence of express statutory provision, the duration of Sunday is identical with the other days of the week, beginning at midnight of Saturday and ending twenty-four hours thereafter. In Maine and Massachusetts Sunday begins at midnight and ends at sunset. This permits of legal Sunday night movies. In the days of the Puritans, the children and some of the adults who believed in laxity anxiously awaited the Sunday sunset.

As far as I have been able to ascertain, all the States, excepting California and Oregon, have Sunday observance laws. California has a law compelling one day's rest in seven. Many efforts have been made in these two States to secure Sunday observance laws, but without avail.

In some of the States, the laws are more rigid than in others, and the same holds true as to judicial decisions. In some jurisdictions, it is held that as these statutes are penal, they must be strictly construed and are not to be extended by judicial construction, while the contrary is held in other jurisdictions.

State Court Decisions

Under the common law, all business other than legal and judicial proceedings was permissible on Sunday, but the statutes of practically all the States, except California and Oregon, prohibited traveling, worldly employment or business, ordinary labor and the playing of sports, pastimes or diversions, in these words or somewhat similar phraseology. Under such prohibitions, the courts of many of the States, including New Jersey, have declared contracts made on Sunday void, as being under the inhibition "worldly employment."

The Pennsylvania Supreme Court evenly divided on the question of whether a marriage contract entered into on Sunday was an infraction of the prohibition "worldly employment." (14 *Pa. St.*, 417, 53 *Am. Dec.* 554.) But it was subsequently held that such a contract was valid, if subsequently recognized. It has been held in Massachusetts that a Sunday marriage is valid, though "purely a civil contract." 9 *Allen* (*Mass.*) 118, 1864. And the court in New Hampshire declared: "Its (marriage) validity may be put upon the ground that the contract has been executed and the status of the parties changed by it, and, therefore, * * * the law will not interfere, but leave the law as it finds them." 47 *N. H.* 27, 1866.

In Pennsylvania, the court observed that the making of a will was not "worldly business," but "as to writing them it would not say." It later sustained a will made on Sunday, on the ground that it did not take effect until the testator's death. 55 *Pa.* 183. A Connecticut judge held that funerals conducted on Sunday constituted "worldly employment."

The transmittal of a telegram concerning ordinary business or social affairs cannot be regarded as a work of necessity. 91 *Ga.* 252; 118 *Ind.* 248. I pleasurably anticipate the courts wrestling with the subject of Sunday telephonic and radio communications.

Sunday Baseball

Indulgence in sports and amusements must be specifically prohibited by statutory provisions, as these are not within the meaning of common or ordinary labor or worldly employment. 14 *Ind.* 396; 64 *Neb.* 316.

> "In 7 *Corpus Juris*, page 932, note 52 (a), the origin of baseball is thus stated:
>
> "'In a prosecution for playing baseball on Sunday, brought under a statute providing that persons convicted of horse racing, cock fighting or playing cards or any game of any

> kind on Sunday should be guilty of a misdemeanor, one of the reasons suggested for holding that the statute was not to include baseball was that when the statute was adopted the game was unknown. In referring to this suggestion the court said: "Until very recently there has been more or less controversy as to the early history and origin of baseball, some contending that it is only a modified form of the English game of rounders. In order to settle the dispute a special baseball commission was appointed, consisting of a number of eminent men. Their report was published in 1907, and the commission, after full investigation, unanimously decided that baseball is distinctly an American game; that it originated in Cooperstown, New York, in 1839, and that the first scheme for playing it was the invention of General Abner Doubleday, who afterward graduated from West Point and achieved honorable distinction in the Civil War. The rules of the game as first published by the Knickerbocker Club, of New York, in 1845, differ only in a few minor details from those of the modern game. Baseball was first played by regular clubs in 1845, and, while it had begun to attract attention in the fifties, it did not become a common form of sport or exercise, and was not generally played until 1865. The first professional club was organized for playing it in 1868."' *State* v. *Prater*, 79 *Kan.* 513."

The courts of New York have declared that it is not illegal *per se* to play baseball on Sunday. 56 *Misc.* (*N. Y.*) 285, 107 *N. Y. Suppl.* 295.

The Supreme Court of Tennessee declared that professional baseball on Sunday was not within the provision of "playing of any game of sport on Sunday." The decision states:

> "The statute does not prohibit the playing of professional baseball; the game not having been in existence when the statute was enacted. * * * It is a well-settled rule that penal statutes are to be construed strictly, and are not to be extended beyond the plain letter of the law * * *. If you undertake to extend the statutes to the many avocations that have since come into vogue, and which the legislature could not have in mind, you are confronted with very serious problems, the result being that a very large number of our industrial and pleasurable operators are persistent violators of the statute. The thousands of men engaged in operating our railroads, traction companies, taxicabs * * * boot-

> blacks, musicians, whose avocations as members of a band, play in our city parks on Sunday afternoon for the entertainment of the large number of people who frequent such places for fresh air and sunshine, and even the professional musician, who sings as an avocation, and who hires himself to one of our church choirs and sings in church Sunday after Sunday, all of these are violators of the statute, and many other examples could be cited. * * * And the legislature had in mind the common avocations of life engaged in by the people at that time. The legislature did not undertake to enumerate them—it was unnecessary as they were commonly known and understood by the people." *Tenn. R.* 141, 456.

Perhaps, the Trenton Council of Churches had this and other similar decisions in mind when they published an advertisement in the last political campaign stating—"*It is permissible* to now have innocent amusements on Sunday; to play games in public parks; to have municipal band concerts." Their authoritative statements justify the pertinent inquiry—By what right do they claim to possess a prerogative of civil authority?

The State of Texas has a statute which provides, among other things, "The proprietor of any place of public amusement, who shall sell, barter or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined." The law further defines a place of public amusement to include circuses, theatres, variety theatres "and such other amusements as are exhibited and for which an admission fee is charged."

A game of baseball was played in a baseball field on Sunday and an admission fee was charged. The Supreme Court held that it was not unlawful to play baseball on Sunday. Part of the decision follows:

> "It is elementary, before a citizen can be punished as a criminal, that the offense must clearly be defined by the statute and an appropriate penalty fixed. Further, it is a rule of construction well known that in undertaking to fix and place the meaning upon the statutes, we should do so in the light of contemporaneous history, and in reference to the habits and activities of our people. It is known, of course, that baseball is the most generally practised, patronized and approved of all the games of exercise, and that it is the cleanest and fairest of all manly sports, and excites rivalry in the youth of our land, and that every village and hamlet has its favorite 'nine,' and many ambitious youths who dream of the

> day when they shall equal, if not excel, Matthewson, Speaker, Cobb, Napoleon Lajoie and Honus Wagner. It is also well known that for many years, in many of our larger cities, baseball on Sunday has not only been frequently but continuously played, where an admission fee is charged. Now, it would have seemed in the light of these facts that if it had been legislative intent to condemn this form of amusement and include it within the statute under consideration, it would have been an easy matter to have done so in express words, and not left the matter at least clouded in doubt. 'We have not been furnished, and have been unable to find, a single case holding a statute of this character, passed prior to the date that baseball became known, applicable. And even as to similar statutes, passed in recent years, the weight of authority seems to hold that they do not apply to baseball.'" 60 *Tex. Cr.* 282.

Evidently the judge writing the opinion was a baseball fan.

The courts of Kansas (79 *Kan.* 513), Missouri (157 *Mo.* 527) and New Mexico (17 *New Mex.* 214), have likewise held that the playing of baseball on Sunday, even where an admission fee is charged, is not a violation of the law.

The courts of the following States have decided Sunday baseball to be illegal where an admission fee is charged: Nebraska (69 *Neb.* 245), New York (56 *Misc., N. Y.,* 287).

In *Paulding* v. *Lane* (55 *Misc., N. Y.,* 37, 104 *N. Y. Suppl.* 1051), it was held that baseball playing on Sunday to which the public is invited is a violation of law whether an admission fee is charged or not.

I have been unable to find any Supreme Court decisions of New Jersey as to Sunday baseball, but the Court of Chancery has rendered several opinions based upon the principle that—"The playing of baseball on Sunday will be enjoined if it be made to appear that the noise and disorderly conduct attendant upon the games being held forth amounts to a nuisance in the neighborhood, whereby the peace and quiet of the Sabbath is disturbed and the rest which the complainants are entitled to enjoy on that day is appreciably affected; each case must stand or fall on the question of nuisance or no nuisance, as the Court of Chancery has no jurisdiction to enforce, by injunction, the Sunday laws, so-called." "Noises which are not nuisances on a week day may be nuisances when made on a Sunday * * *; and the fact that such noises are forbidden by the laws of the land (the Sunday laws) takes away any defense for the making of them on

Sunday even though they be but slight."—76 *N. J. Equity*, 256, 1909. Citations of three preceding cases are given in this opinion.

Sunday Movies

The Supreme Court of New Jersey decided that a municipality cannot, under color of the license power, confer the right to violate the Sunday provisions of the Vice and Immorality Act. In this case, Martin Singer was convicted for violating an ordinance of the City of Newark in that he did exhibit, for a price, gain or reward, moving photographs or pictures without having first obtained a permit for that purpose. The opinion states, "The prosecutor attacks the conviction on several grounds, but the case is sufficiently disposed of on the broad ground that as the twenty-sixth day of September was a Sunday, a fact of which we take judicial notice, and as the Act for suppressing vice and immorality forbids all worldly employment or business * * * interludes and plays * * * sports, pastimes or diversions, on Sunday, under penalties therein prescribed, it was incompetent for the City of Newark to legalize the acts in question on a Sunday under the guise of a licensed occupation; and, hence, there could be no right to impose any penalty other than that provided in the statute for the acts complained of."—79 *N. J. Law* 386, 1910.

Vice Chancellor Backes decided that "Conducting a moving picture show is undoubtedly 'worldly employment or business,' interdicted by the statute. A moving picture show perhaps may come within the definition of interludes and plays, but this need not be decided." And for this reason he refused an injunction to enjoin the police authorities of Long Branch from reading a proclamation relative to riots, routs and tumultuous assemblies to the audience gathered in a theatre on Sunday.—82 *N. J. Equity* 570.

In writing my third article, I purposely omitted the provisions of Chapter 191, Laws of 1920, entitled "A Supplement to an Act entitled 'An Act to Establish Public Parks in Certain Counties in this State and to Regulate the Same,' approved March 5, 1895," for the reason that it was my desire to keep the Acts regulating State-wide Sunday observance separate and distinct from this Act which only affects the citizens of a limited portion of the State.

Briefly stated, the Act of 1895 provides for county parks in counties having 200,000 or more population, and for the appointment of Park

Commissioners to provide and maintain such parks, if the voters adopt the provisions of the Act. The Supplement of 1920 provides for the playing of games, etc., without admission fees, in such parks, under the supervision of the Park Commissioners. It is my recollection that the voters of only the Counties of Essex and Hudson adopted the provisions of the Act of 1895. However, the limitation as to population would restrict its provisions to Bergen, Essex, Hudson, Passaic and Union Counties.

Rev. Frederick W. Johnson, D.D., in his summary of the so-called Sunday Laws, published in the State Gazette, December 5, 1923, by the Lord's Day Alliance of New Jersey, states that it is better for our children in those cities having a large percentage of foreign-born residents to play in the parks under proper police supervision than run into danger on our public streets. That is quite true, but as every citizen of average intelligence knows, it is not only the children of foreign-born parents, but also those of American-born parents that play in our public streets. If it is a wise provision for Hudson and Essex counties, it should be made uniform throughout the State. And purely as a record of the facts, and not in criticism of Dr. Johnson, the law does not limit such recreation in county parks to children.

New Jersey Court Decisions

Prosecutions for violations of the so-called Sunday Laws have been few and appeals to the Supreme Court have been limited to about six in number.

In *Reeves* v. *Butcher*, 2 *Vroom* 224, which was a suit on contract, Chief Justice Beasley said, referring to a certain provision of the Vice and Immorality Act: "This language, in its obvious and usual signification, would seem to prohibit all *secular* affairs on the day specified" (Sunday). In an opinion delivered in 1911 by Associate Justice Minturn, of the Supreme Court, it is stated that the "immemorial policy of the State, as indicated by the Vice and Immorality Act, has been to set aside Sunday as a day of rest."—82 *N. J. Law* 345.

The Supreme Court at the same term also declared: "An order of the Board of Public Utility Commissioners requiring a railroad company to stop such trains as are run on Sundays at a given station is not void as being in conflict with the Vice and Immorality Act, for it does not require the running of trains on Sunday, but simply compels such as are run to serve the people without discrimination." —82 *N. J. Law* 309. In my judgment, that is common sense applied

to a legal contention, but it does not seem to be in accordance with the ethics of a Court which had declared the language of the same Act to prohibit all *secular* affairs on Sunday; neither does it seem to be in accordance with the principle of "immemorial policy" above quoted. I fully expected the learned Justices to declare that they could not ignore, and by indirection sanction, an infraction of the laws which had thus been disclosed, and to direct the sheriff of Monmouth county to summarily enforce the law, but I have learned that admission to the temples of justice is not denied to that invisible but powerful motive force of human conduct—expediency.

Works of Necessity

There are no decisions on this point by our higher State courts. The most commonly accepted definition is that given in a Massachusetts case—that necessity does not mean a physical or absolute necessity but a moral fitness or propriety of the work performed under all the circumstances of each particular case.—4 *Cush.* (*Mass.*) 243. "Not an absolutely unavoidable, physical necessity * * * but rather an economic and moral necessity."—61 *Ark.* 216. I wonder if our business men, particularly our manufacturers, realize the embarrassment a strict enforcement of the Act would mean to them.

It cannot be asserted that the operation of passenger and freight trains within this State, other than those permitted by the Act, is within the exception of "works of necessity," for the reason that the Act was broadened in 1854 to permit the operation of freight trains transporting milk, and in 1873 to permit one passenger train each way on Sunday. These clearly and indisputably show that the intention was not to permit such operations under the exception "works of necessity."

The New Jersey Supreme Court held that the right to run such trains (passenger) "confers the right upon the citizen to use such trains for *ordinary* travel."—46 *N. J. Law* 7.

The prohibition against the running of passenger and freight trains with the exceptions heretofore stated, is not limited to intrastate traffic, and, therefore, under the decisions of the U. S. Supreme Court, in *Hennington* v. *Georgia* (163 *U. S.* 299), the prohibition also applies to passenger and freight trains operated in interstate commerce.

It cannot be claimed that trolley cars are within the exception "works of necessity." Horse-drawn street cars were in operation

on week days in 1873, the time the Legislature broadened the Act to permit the operation of one passenger train each way on Sunday, and if it had been the desire of the legislators at that time to exempt them, such intent would have received legislative sanction. As a matter of information and not as having any bearing upon the intent of the New Jersey Act, the Courts of Massachusetts have held that the operation of trolley cars is not within the exception "work of necessity."—135 *Mass.* 113. While the Supreme Court of Georgia holds it to be a work of necessity.—55 *Ga.* 126.

Furnishing water, artificial light and gas for heating and cooking purposes are works of necessity (85 *Ark.* 188); also the delivery of milk (58 *Kan.* 328), but the delivery of ice and fresh meat is not.—81 *S. C.* 197.

Works of Charity

So far as I have been able to ascertain, there has been no decision by our higher State courts on this exception. The Supreme Court of Massachusetts has construed charity to be "active—goodness and must proceed from a sense of moral duty or a feeling of kindness and humanity, and must be intended wholly for the relief or comfort of another."—118 *Mass.* 195, 131 *Mass.* 156.

Vice and Immorality Act Unconstitutional

In 1844, a new State Constitution was drafted by deligates in convention assembled. It eliminated the preference given Protestants by the Charter Rights of 1776. The voters of the State adopted and ratified the Constitution the same year. The debates in the convention show that the intent of the proposed Amendment, in so far as relates to religious matters, was to guarantee freedom of conscience and absolute religious liberty. One of the provisions of that Constitution, which is still in force, provides:

> "There shall be no establishment of one religious sect in preference to another; * * * and no person shall be denied the enjoyment of any *civil right* merely on account of his religious principles."

If the Sunday laws were enacted to promote religion and to compel observances that are only required by particular creeds who consider them a divine obligation, they undoubtedly provide, though by indirection, for an establishment of one religious sect in preference to another. That they create a preference cannot be disputed. They deny to the Jews and to the Seventh Day Adventists, who observe

Saturday, and to the Mohammedans, who observe Friday, the *civil right* to work unrestrictedly, on the first day of the week. The Jews and the Seventh Day Adventists who conscientiously observe the seventh day of the week, in accordance with the Fourth Commandment or the Second, as some number it, are therefore compelled by their religious convictions and the civil law to rest two days in each week, thereby indirectly taxing them because of their faith.

"Intention is the cardinal rule in the construction of statutes."—*Encyclopedic Digest,* Vol. XI, 529, where many cases are cited. The intention of the Vice and Immorality Act can best be ascertained from an historical investigation of its origin.

I have shown that the Sunday Laws had their origin in Pagan conception; that in 800 A. D., Charlmagne prohibited servile work on the Lord's Day, "but that they all come to church to magnify the Lord, their God;" that the General Assembly of the Province of East New-Jersey passed an Act in 1676, requiring the people to "abstain from their common daily labor that they may the better dispose themselves to *worship God;*" that in 1682-3 an unsuccessful effort was made in East New-Jersey to compel the inhabitants to worship God on Sunday; that the same year, the General Assembly of East New-Jersey passed an Act entitled, *"Against prophaning the Lord's Day";* that the Council and Representatives of West-Jersey, in 1693, passed an Act entitled, "An Act for *preventing profanation of the Lord's Day,*" wherein it is stated that the object of setting apart the first day of the week is for the *"worship and service of God;"* that the Legislature of the State of New Jersey, in 1790, passed an Act entitled, "An Act to *promote the interest of religion and morality,* and for the suppressing of vice among all ranks of people within this State;" and that in 1798 the Legislature passed an Act entitled, "An Act for supressing vice and immorality," which was what might be termed a codification of the then existing Sunday laws, and, with few exceptions, is identical with our present Act.

While all of these laws prohibited the doing of secular acts, the object was not to provide a day of rest nor to conserve the health and physical and mental welfare of the citizens. Their essence is expressed in explicit and unmistakable language in their titles—*"Against prophaning the Lord's Day,"* "An Act to *promote the interest of religion* * * *," and is also expressed in explicit and unmistakable terms in the body of the Acts—"to abstain from their common daily labor that *they may the better dispose themselves to worship God"* and *"for the worship and service of God."*

In ascertaining the intention, the decisions of the courts rendered immediately and within a reasonable time after the passage of the Act are pertintent. I have shown that such decisions of other States based upon practically similar statutes designate Sunday as *sacred* or *holy,* and frequently refer to the *sanctity* of Sunday and the *desecration* of Sunday.

But, ignoring the origin of the present Act and the court decisions, some of its provisions clearly and indisputably indicate that the intention is religious—spiritual welfare and not physical welfare.

Section 33 of the Revision of 1877 (*Comp. Stat., p.* 5723), provides: "Every inhabitant of this State who *religiously observes* the seventh day of the week as the Sabbath shall be exempt from answering any process," etc. Will the courts declare the term *"religiously observes"* infelicitous as they have in other cases?

Before they do so, it would be advisable to consider the language of the next section providing a further exception for seventh day observers. I quote, in part:

> "That if any person, charged with having labored or worked on the first day of the week, commonly called Sunday, shall be brought before a justice of the peace to answer the information and charge thereof, and shall then and there prove, to the satisfaction of the said justice, that *he or she uniformly keeps the seventh day of the week as the Sabbath,* and habitually abstains from following his or her usual occupation or business, and from all recreation, *and devotes the day to the exercise of religious worship,* then such defendant shall be discharged, * * *."

If the intention of the act is solely to provide a day of rest, the language "habitually abstains from following his or her occupation or business, and from all recreation" would have sufficed. The language *"that he or she uniformly keeps the seventh day of the week as the Sabbath * * * and devotes the day to the exercise of religious worship"* unmistakably proves that religion and not rest was the legislative intention.

The title and body of the Vice and Immorality Act clearly indicate that the legislative intention was to designate Sunday for purely religious and not civil reasons, but is it any more of a vice or is it any more immoral to travel, to operate passenger and freight trains, or to indulge in some forms of recreation on Sunday than it is on a weekday?

The enactment of laws regulating economic and social conditions and the general welfare of our citizens have been due to educa-

tional efforts and the insistent demands of at least an active group of our citizens. The Vice and Immorality Act was not passed in response to any such demand. *It was not enacted to protect man, but to promote religion.* The summary of the origin of the law, of contemporaneous judicial decisions and the analysis of certain portions of its language makes the intention too obvious to be controverted by a layman.

Legal Subtleties

But the judicial mind is different. It has been trained to fine distinctions and spider-web subtleties. The following illustrates my meaning and justifies my designation. A judicial decision holds that "the term servile (slave) labor," which was properly expressive of the conditions existing at the time of the enactment of a law, was evidently intended to mean "secular labor" at a date when servile labor was not properly expressive of the existing condition. However, I am glad to state that the opinion was not delivered by a judge of this State. I am also not unmindful that it was by legal subtleties that Sir Walter Raleigh was executed fifteen years after pronouncement of sentence. And in my humble judgment, as a layman, someone blundered in rendering the Dred Scott decision, and had it not been for the adoption of the Thirteenth Amendment it is likely that more erroneous decisions would have been delivered, based upon that precedent, than there were casualties in the Charge of the Light Brigade at Balaklava. But if it be true, as has been stated, that the decision was indirectly the inspirational motive that caused Julia Ward Howe to write, some years thereafter, the immortal poem, "The Battle Hymn of the Republic," the ruthlessness of the decision was compensated by her arousal of an indomitable spirit that force of arms, sustained by southern chivalry, could not withstand.

I think I may be further justified by the fact that by judicial decisions it is legal to separate white and negro children in public schools.—5 *Cush.* (*Mass.*) 198; that it is not legal to separate whites and negroes in the jury box (100 *U. S.* 303), but that it is legal to separate them in a passenger train.—163 *U. S.* 537.

1893 Amendment Unconstitutional

Regardless of the decision of the courts relative to the constitutionality of the Vice and Immorality Act, the amendment of 1893 thereto, making it not unlawful to print, publish and sell newspapers, to sell and deliver milk, to walk, ride or drive for recreation, and to

hire horses and carriages or other conveyances for riding or driving, is so clearly unconstitutional that argument would be useless. A clause of paragraph 4, section VII, article IV of the State Constitution provides:

> "No law shall be revived or amended by reference to its title only; but the act revived, or section or sections amended, shall be inserted at length."

The Act of 1893 amends the act for suppressing vice and immorality by reference to its title only. However, it is the law until declared unconstitutional, but when it is so declared, we will be governed by the law enacted in accordance with the prevailing sentiment and customs of 1798, unless relief is given in the meantime.

Home Rule Advocated

The Rev. Hamilton Schuyler assumes an unassailable position in advocating the principle of Home Rule for this as well as other municipal problems. It is the rule that now prevails in New York. In 1919, the State of New York empowered its municipalities to permit by ordinance the playing of baseball and the exhibition of motion pictures on Sundays after 2:00 P. M.

Associate Justice Minturn, of the Supreme Court, published an appeal in 1920, advocating a modification of the Act, in which he said, among other things:

> "In such a status, the retention of such a law upon the books results only in public contempt for the observance of all law, and such a popular state of mind is always inimical to law and order, and breeds contempt for government and its administrators * * *.
>
> "No reasonable American can survey the field to-day and not perceive almost with a shudder the unrest, the distemper, and the sullen disregard for law and order which prevails. Will the Church further accentuate this condition by refusing to meet in conference the men and women whose organizations and votes present in our representative system a potent argument to the statesman for changes of some kind in the organic law, to accord with public sentiment in populous centers? * * *.
>
> "History attests that humanity cannot be coerced, because coercion is the forerunner of revolution * * *.
>
> "The heart of America, represented in the grime and soil of the mine, the workshop and the foundry, is essentially

religious, and still beats in unison with the prayer of the Nazarene, as well as with the spirit of Patrick Henry.

"Never in Church history was such an opportunity presented to churchmen and to Christian statesmen for the reconciliation of the people to fundamental concepts of religion and law.—"*

And I will add that the unrest and sullen disregard for law is caused, in a large measure, by the fact that the great majority of the people clearly understand the *object* of the law and bitterly resent the judicial fiction of a day of rest.

Secure Repeal by Strict Enforcement

I would also agree with Dr. Schuyler's advocacy of a strict enforcement for the purpose of forcing a repeal of the act, but that is impracticable unless the Chief Justice and the Associate Justices serve notice on the peace officers of their respective judicial circuits that the law is being violated, and thereby secure uniform enforcement. But, perhaps, there is not a complete agreement among the members of the Supreme Court as to its constitutionality or as to the construction to be placed upon its many provisions, for in several judicial circuits professional Sunday baseball is being played, and in other judicial circuits motion pictures are being shown on Sunday, both apparent violations seeming to be exempt from judicial censure. However, I venture the assertion that the law will not be amended or repealed in any material respect until some radical action is taken, for the reason that the senators from the rural counties seem to be fearful of ecclesiastical influence.

Attitude of the Director of Public Safety

I recognize that my official obligations require me to enforce all laws and ordinances, but Edmund Burke truthfully said, "You cannot indict a whole people." This recently has been demonstrated by our last grand jury. And I know of no means of stopping passenger and freight trains by the use of a police force without endangering lives. I know of no law that will permit the police to censor telegrams on Sunday or on any other day. I know that I might no longer be immune from being committed to the New Jersey State Hospital for the Insane if I attempted to forcibly stop the running of trolley cars and auto-busses on Sunday.

*See Appendix for the full text of the appeal of Justice Minturn.

I am not clothed with discretionary powers, and I refuse to permit expediency to govern my actions by enforcing certain provisions of the law demanded by a group of citizens, and certain other provisions demanded by another group who are antagonistic to an enforcement of the provisions demanded by the first group. I refuse to recognize a superior right of the so-called social, intellectual or moral classes to dominate to the exclusion of the masses.

That the Vice and Immorality Act cannot be enforced in its entirety is a fact almost universally recognized. Therefore, as an attempt to enforce it would result in permitting many of our citizens to enjoy special privileges, by reason of its unenforceable provisions and deny to other citizens the enjoyment of equally harmless privileges, by reason of its enforceable provisions, thereby creating social hatred and political strife, detrimental to good and orderly government, I have enforced only such of its provisions as are necessary to maintain public decency and good order, and to prevent public nuisances.

APPENDIX

Repeal of New Jersey's Sunday Blue Laws Advocated

Hon. James F. Minturn

Justice of the Supreme Court of New Jersey

I approach the consideration of this question as a churchman and a lawyer. A representative form of government, as the name implies, is presumed to be responsive to the sentiment of the people it represents. When it ceases to be responsive to popular sentiment, it becomes an autocracy, and history evinces that autocracies are short-lived.

Our ancestors were an intensely religious people. They carried religion into their everyday lives, and they based their conception of government, like the Hebrews, upon its principles and ideals. Aside from fundamentals, the cornerstone of their system was the strict religious observance of Sunday, to the exclusion of work and diversion, excepting only works of necessity, and this conception was formulated into law in Massachusetts Bay Colony and the Connecticut farms, and finally copied as the law of the land wherever the influence of the Puritan sentiment was dominant.

When the lure of the factory, the workshop, and the city tempted the young people from the farm and village, and inculcated a new theory of economic domination and new ideals and ambitions, the sunlight of God's open air was thereby denied them by men's

artificial creations; and when the fresh air of the fields, which gave to America the blood and sinew of men who dared to do the things our history records, was no longer theirs, the old order began to lose its dominance, and the sinews of combined capital and its corollary—the labor organization, representing the new economic order—loomed up as the dominating forces in American political life. Buckle, in his "History of Civilization," informs us that the nature, character, and habits of peoples are the product of their environment. If a concrete instance in support of this statement were needed, we have it in the great change that America underwent, from the ideal life of farm and village and its religious environment to the economic and materialistic life that now prevails so largely in our ever-increasing municipal population and its worship of worldly things.

Sunday a Day of Enjoyment

In the agricultural days, men, women and children worked to satiety in the fresh air of the open, and longed for the church and meeting house of Sunday. In these days their descendants stifle in a contaminated atmosphere within doors, and long for a glimpse of the fields. The boy in the cities confined in school and house and workshop longs for the vacant lot or the open river. The working men and women look upon Sunday as the only day in which they can enjoy life and with their families imbibe the fresh air of the fields. In the woods, on the rivers, at the seaside, they throng in multitudes, seeking rest and relaxation from an economic atmosphere that denies them both.

The demand for a change in the religious structures of the American Sabbath is evolved by this change of conditions, and comes from this urban population seeking air, rest and recreation from the putrid and confining environment of shop and factory. To a large extent the old ideal of the American Sabbath still dominates in the agricultural districts; and the problem presented to representative government as between a historical ideal and an economic necessity, is how to harmonize the situation without sacrificing the substance of the cherished ideals.

In our country the church typifies the moral and religious strength of a few people, and stands as its representative. In attempting to stand for the colonial and agricultural Sabbath in the manufacturing and workshop districts and in the cities, the church is placed practically in the attitude of an opponent to the popular demand for outdoor relief on Sunday, and this, of course, is unfortunate. As a churchman,

I cherish the beautiful ideal of the American Sunday, but I cannot close my eyes to what many prominent churchmen concede—that one of the crying problems of the day, in church life, is how we may fill our churches in the cities, or at least increase the attendance of men.

Is the attitude of the Church upon this problem in the cities and manufacturing districts inviting trouble and dissension and absenteeism? If so, does it not behoove us to cast about and adopt some rational *modus vivendi*?

Old Laws Ignored

"You cannot," says Edmund Burke, "indict a whole people." And so you may retain upon the books the legislative edicts of former days, but if they run counter to the temper of the times, grand juries will ignore their violations and courts thereby become helpless to enforce them.

In such a status, the retention of such a law upon the books results only in public contempt for the observance of all law, and such a popular state of mind is always inimical to law and order, and breeds contempt for government and its administrators.

If you attempt to suppress the boy ball player on the vacant lot, or the man or woman who finds enjoyment and recreation upon a Sunday afternoon in the picture show, the grand juryman looks askance and desires to know upon what legal theory of exemption his neighbor may find recreation on the golf field, or on the country roads in an automobile.

Years at the bar, and my experience on the bench, have enabled me to perceive the inequality which results from this condition; and when the masses of the people recognize inequality in the application of the law and its enforcement, that decent respect for law and its administrators which in the earlier days was characteristic of American citizenship, becomes endangered.

No reasonable American can survey the field to-day and not perceive almost with a shudder the unrest, the distemper, and the sullen disregard for law and order which prevails. Will the church further accentuate the condition by refusing to meet in conference the men and women whose organizations and votes present in our representative system a potent argument to the statesman for changes of some kind in the organic law, to accord with public sentiment in populous centers?

It is no answer to this demand to charge that among its advocates are the parties interested in the financial returns which the realization

of the change will bring. These forms of recreation could not exist a week were the public to cease its patronage and seek a new field for relaxation.

Cannot Be Coerced by Law

In the last analysis an educated constituency in a church or in a political order cannot be enlightened or coerced by law. The appeal to the congregations outside the church must be made upon a basis of Christian brotherhood and charity, which recognizes the changes which time and the new economic order have involved in our manner of living and the consequent demand for leisure and such recreation and reasonable diversion as the new conditions make necessary.

History attests that humanity cannot be coerced, because coercion is the forerunner of revolution.

The church, to be successful in its mission in this land and this day, must hold out a sympathic hand to the people and mingle with the toilers and workers, as its greater Founder mingled with the fishermen and laborers, the poor and lowly of Galilee.

The religious crusade of the future to be successful with the people must forget a great deal and turn its face to the coming race, inculcating religion not only from the lofty heights of the pulpit, but down among the haunts of the men where "one touch of nature makes the whole world kin."

The heart of America, represented in the grime and soil of the mine, the workshop and the foundry, is essentially religious, and still beats in unison with the prayer of the Nazarene, as well as with the spirit of Patrick Henry.

Never in church history was such an opportunity presented to churchmen and to Christian statesmen for the reconciliation of the people to fundamental concepts of religion and law.

Such "a consummation is devoutly to be wished," not only in the interest of the State, but in the interest of the church, whose basic interests and future development in a country like this depend in no small degree upon the realization and adoption of a mode of procedure which, *while it sacrifices nothing in Christian essence, avoids popular antagonism by conceding, like one of its great doctors, liberty in non-essentials and charity in all things.*

Function of Law

The numerous laws of New Jersey on the subject of Sunday Observance amply justify the statement of James Coolidge Carter, one

of the pre-eminent members of the American bar in his lifetime, author of the text-book, "Law: Its Origin, Growth and Function:"

> "Nothing is more attractive to the benevolent vanity of men than the notion that they can effect great improvement in society by the simple process of forbidding all wrong conduct, or conduct which they think is wrong, by law, and of enjoining all good conduct by the same means; as if men could not find out how to live until a book were placed in the hands of every individual, in which the things to be done and those not to be done were clearly set down" (p. 221).
>
> "The principal danger lies in the attempt often made to convert into crimes acts regarded by large numbers, perhaps a majority, as innocent—that is, to practice what is, in fact, tyranny. While all are ready to agree that tyranny is a very mischievous thing, there is not a right understanding equally general of what tyranny is. Some think that tyranny is a fault only of despots, and cannot be committed under a republican form of government; they think that the maxim that the majority must govern justifies the majority in governing as it pleases, and requires the minority to acquiesce with cheerfulness in legislation of any character, as if what is called self-government were a scheme by which different parts of the community may alternately enjoy the privilege of tyrannizing over each other. The principal evils of legal tyranny arise from the instrumentality which it employs, which is always FORCE" (p. 246).
>
> "I do not hesitate to say that any legislation which bears the characteristics of TYRANNY, as I have defined that term, is vicious in theory and has never yet succeeded, and never will succeed, in gaining its avowed end, or in having any other than an injurious effect; and I venture to add that if the zeal and labor which have been employed by what are called the better classes of society in efforts to enact and enforce laws repressive of liberty, had been expended in kindly and sympathetic efforts to change and elevate the thoughts and desires of those less fortunate than themselves, a benefit would have been reaped in the diminution of misery and crime which compulsory laws could never accomplish. Moral ends can never be gained except by moral means. All the advances in civilization and morality which society has thus far made are due to the cultivation and development of those moral sym-

pathies which find their activity in co-operation and mutual aid" (p. 251).

Severe Penalties in Other Days

As evidence of the prevailing sentiment of the people on civil matters at a period contemporary with the early period of the Province of New Jersey, I will briefly enumerate a few of the laws relative to crimes promulgated in that Province in or about the year 1668 and the penalty provided therefor.

The Puritans were not the only persons to punish witches, as is shown by the following law:

> "If any person be found to be a Witch, either Male or Female, they shall be put to Death."

This dispels the erroneous impression that a witch was an old, ugly and malignant woman.

The law provided a severe penalty for undutiful children:

> "If any child or children above sixteen years of age, and of sufficient understanding, shall smite or curse their natural father or mother except provoked thereunto, and forced for their safe preservation from death or maiming, upon the complaint or proof of the said father or mother or either of them (and not otherwise) they shall be put to death."

The penalty for stealing was treble restitution for the first offense and the like for the second and third offense with "such further increase of punishment as the court shall see cause; and if incorrigible to be punished with death." A subsequent statute provided that if the offenders be "not able to make restitution * * * they shall be *sold,* that satisfaction may be made."

Persons guilty of the first offense of burglary were punished by being burned in the hand with the letter T and to make restitution; for the second offense, branded on the forehead with the letter R and make restitution, and for the third offense, to be put to death as incorrigible.

Lying was also anathema:

> "It is enacted by this General Assembly that if any person above the age of fourteen years, shall wittingly or willing make and publish any lye, * * * the person so offending shall for the first offense pay by way of fine 10 shillings; and for the second offense, and such default, shall pay 20 shillings, which fine shall be levied upon his or their estate for the use of the public; but if any person be not able to pay his fine as aforesaid, for the first offense shall be put in the stocks, and to continue two hours; for the second offense to continue four hours; for the third offense to have corporal punishment."

They firmly believed in the principle of restitution—"the estates of murtherers, after debts be paid, shall go one-third part to the next of kin to the sufferer and the remainder to the next of kin to the criminal."

The legislators had somewhat of a peculiar idea of marital chastity:

> "That if any man shall absent himself, or run out of this Province, with another man's wife (without her husband's consent) and return hither, he and she so offending, and being lawfully convict thereof, shall each of them receive ten lashes upon their bare back. The husband of such woman may after the expiration of six months from the time of her going away, and unlawfully absenting herself, be Ipso Facto released from the obligation of marriage, and at liberty to marry another woman, and the former offending wife shall absolutely forfeit and leave all her claim to her said husband's estate, real and personal, and every part and parcel thereof." Province of East New Jersey, 1682.

A diligent search failed to disclose any similar provision for the benefit of a wife whose husband eloped, without her consent.

In 1761, the General Assembly of the Royal Province of New Jersey passed an Act authorizing the church wardens and vestrymen of St. Peter's Church at Perth Amboy to raise by lottery a sum not exceeding one thousand pounds for repairing the church, parsonage, school house and ferry house. In 1762, a similar Act was passed for the benefit of St. Mary's Church at Burlington. In the same year the trustees of the College of New Jersey were authorized to raise a sum of money by lottery.

There has been but little change in ethics and morality as to games of chance since that period. Charity is made to cover a multitude of sins (and crimes) to-day, to nearly the same extent as it did over a century and a half ago. Notwithstanding that all forms of gaming, etc., are prohibited and made misdemeanors, persons to-day contend that games of chance should be permitted if the benefit therefrom accrues to charity.

I believe it unwise to ignore the statements of penologists and criminologists that this practice and the active participation therein by persons of immature years has a pernicious effect in materially influencing the minds and in developing an undesirable trait in our

young people, expressed by words, and by actions later in life as "taking a chance," which is the direct cause of a not inconsiderable percentage of crimes.

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TITLE